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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 5904 (S.C. Ct. App. Filed April 6, 2022)

Lower Court Case No. 2014-GS-32-01630

THE STATE,

RESPONDENT,

V.

ERIC EMANUEL ENGLISH,

PETITIONER

APPELLATE CASE NO. 2018-000850

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 6, 2022.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming Petitioner's conviction for criminal sexual conduct with a minor where the trial court admitted test results showing Petitioner had gonorrhea and another man the minor accused of sexually assaulting her did not, where no one from the laboratory responsible for the analyses testified, since pursuant to *State v. James*, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971), test results offered to "connect a defendant directly with the commission of a crime" "must be substantiated by the person who conducted the tests"?

STATEMENT OF THE CASE

On October 16, 2017, a Lexington County Grand Jury indicted Petitioner for first-degree criminal sexual conduct with a minor. R. 246 – 247. Petitioner was tried in his absence before the Honorable Eugene C. Griffith, Jr., and a jury from January 8 – 10, 2018. R. 1. Petitioner was convicted as indicted. R. 199, ll. 3-6. On April 9, 2018, Petitioner appeared before the court and Judge Griffith unsealed his sentence. R. 205; R. 208, ll. 5-15. Petitioner was sentenced to forty years imprisonment. R. 247. On April 27, 2018, the parties appeared before the court for a motion to reconsider the sentence, which was denied. R. 218; R. 220, ll. 6-9; R. 229, ll. 7-10.

The Court of Appeals affirmed in a published opinion, *State v. English*, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 82). Petitioner moved for rehearing. The Court of Appeals denied rehearing.

This petition for writ of certiorari follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant certiorari because the decision of the Court of Appeals is in conflict with a prior decision of this Court. *See* Rule 242(b), SCACR. In *State v. James*, 255 S.C. at 370, 179 S.E.2d at 43, this Court held, “Where the results of tests or analyses are offered to prove an essential element of a crime or connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses.”

The way in which the Court of Appeals distinguished *James* from Petitioner’s case in its published opinion rendered *James* inapplicable in future cases. *James* was decided in 1971, which was prior to the United States Supreme Court decision of *Davis v. Washington*, 547 U.S. 813 (2006) and prior to the adoption of the South Carolina Rules of Evidence. The Court of Appeals held that the test results here were admissible under Rule 803(6), SCRE, and concluded that although *James* “has not been expressly overruled,” the adoption of the South Carolina Rules of Evidence in 1995 distinguished *James*. The Court of Appeals further concluded that Petitioner’s case was distinguished from *James* since there was no Confrontation Clause problem in Petitioner’s case. However, there would have been no Confrontation Clause problem in *James*, either, had *James* been decided after *Davis v. Washington*, *supra*. Neither the testing in *James* nor the testing in Petitioner’s case was ordered at the behest of law enforcement. Therefore, the Court of Appeals’ published opinion in this case renders *James* largely meaningless since any future cases that fall under *James* could be distinguished in the same manner.

This Court should remedy this error by granting certiorari. *See* Rule 242(b), SCACR.

STATEMENT OF FACTS

Petitioner's seven-year-old daughter, the minor, was sexually assaulted. On or about March 4, 2014, the minor visited her school nurse and complained that her "private area" hurt. R. 84, l. 9 – 87, l. 21. The minor's mother took her to the doctor and the minor was diagnosed with gonorrhea. R. 87, l. 22 – 88, l. 5; R. 128, ll. 5-10. The minor was interviewed at the Dickerson Center and alleged Petitioner "put his private in [her] private." R. 58, l. 2; R. 65, l. 23 – 66, l. 5. The minor claimed this occurred while her younger brother was present. R. 56, l. 19 – 59, l. 17.

The minor was interviewed at the Dickerson Center a second time and at that time she disclosed sexual abuse by her mother's boyfriend, Jamie Stroman. R. 70, l. 11 – 71, l. 3; R. 24, l. 21. The parties stipulated that the minor had been sexually assaulted by the other man, Jamie Stroman. Stroman admitted to digitally penetrating the child and was convicted of first-degree criminal sexual conduct with a minor prior to Petitioner's trial. *See* R. 231; R. 38, l. 24 – 39, l. 15. The minor said she did not disclose sexual abuse by Stroman because she thought Stroman would hurt her mother if she did so. R. 77, ll. 10-18.

After the minor's mother learned the child had gonorrhea but before any charges were filed, both Petitioner and Stroman were tested to see if they had a sexually transmitted disease (STD). R. 24, ll. 20-21. Petitioner's test results were positive for gonorrhea and Stroman's were negative. R. 145, ll. 5-7; R. 136, ll. 22-24. The urgent care offices visited by Petitioner and by Stroman for the STD testing were both affiliated with the Lexington Medical Center, and their samples were sent to the same laboratory for analyses. R. 140, ll. 12-16; R. 134, l. 16 – 135, l. 1; R. 140, ll. 8-22; R. 143, ll. 2-6.

Pretrial, the State moved to introduce the test results of Petitioner and of Stroman pursuant to Rule 803(6), SCRE and argued the results were business records of tests done for the

purposes of medical diagnosis and treatment. R. 24, l. 23 – 26, l. 15. The State also cited to *Ex parte Dep't of Health & Env'tl. Control*, 350 S.C. 243, 565 S.E.2d 293 (2002) (hereinafter *Ex parte DHEC*) for authority. R. 76, ll. 10-11.

Defense counsel argued the results should be suppressed as inadmissible hearsay pursuant to *State v. James*, 255 S.C. 365, 179 S.E.2d 41, absent testimony by the analyst who performed the tests. R. 27, l. 19 – 28, l. 13. Defense counsel quoted the *James* case in his argument to the trial court: “Where the tests or analyses are offered to prove an essential element of the crime or to connect the defendant directly with the commission of a crime, such results must be substantiated by the person that conducted the test or analysis.” R. 28, ll. 2-7.

However, the trial judge noted he had been the trial judge in *State v. Chisholm*, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011), and the case was not reversed although records of the defendant’s HIV status kept by DHEC were admitted as business records. R. 26, l. 16 – 27, l. 5. The trial court therefore found the tests results here were admissible as business records. R. 29, ll. 7-12; R. 134, l. 12; R. R. 144, l. 21.

Pamela Levi, a nurse practitioner who worked at an urgent care center in Swansea where Stroman’s sample was taken, testified Stroman was seen by another medical professional who took a sample and sent it to the lab for STD testing. R. 130, ll. 9-16; R. 132, l. 7 – 134, l. 1. Levi said two days later she saw the Stroman’s test results in the office computer system and “reviewed them and signed off on them because no additional treatment was needed.” R. 134, l. 5 – 135, l. 10. Levi’s testimony that Stroman’s gonorrhea test was negative and the laboratory report stating the same were admitted over objection. R. 136, ll. 22-24; R. 241 – 243.

Dr. Wesley Frierson, who worked at a Lexington urgent care, saw Petitioner when he came in for the STD test. R. 140, l. 19 – 141, l. 3. Frierson said he took a swab and submitted it

to the laboratory. R. 142, l. 16 – 143, l. 6. Frierson said he viewed and “verified” the results on his computer system. R. 143, ll. 9-20. Frierson did not perform the analysis on Petitioner’s sample, he was not at the laboratory when the sample was tested, and he did not treat Petitioner. R. 145, l. 15 – 146, l. 6. Frierson’s testimony that Petitioner’s test results were positive for gonorrhea and the laboratory report stating the same were admitted over objection. R. 244; R. 144, l. 14 – 145, l. 7.

Interestingly, the prosecution knew how to properly substantiate these test results since it did so with the minor’s test results. When it introduced the minor’s positive test results, it presented testimony from a pathologist who was the medical director at the (different) laboratory that analyzed the minor’s samples. That witness testified about that laboratory’s oversight, accreditation, laboratory inspections by various entities, how the laboratory maintained specimen integrity, how the records were generated, and the types of testing that were done, as well as the fact that both an initial and a confirmatory test were performed on the samples. R. 109, l. 2 – 120, l. 3. However, the prosecution did not do the same for Petitioner’s test results or Stroman’s test results even though the laboratory was in Lexington and the case was tried in Lexington, so it was within the prosecution’s ability to do so.

The solicitor relied heavily on this evidence in closing, arguing, “[Y]ou heard testimony from Ms. Pamela Levi that Jamie Stroman tested negative for gonorrhea, so he did not do this.” R. 171, ll. 11-13. The solicitor said, “When y’all go back to deliberate, just remember [the minor] tested positive, [Stroman] tested negative. [Petitioner], who [the minor] identified as her perpetrator, tested positive. Positive plus a positive equals a positive and I’m positively sure that you will come back guilty.” R. 179, ll. 4-8.

ARGUMENT

The Court of Appeals erred in affirming Petitioner’s conviction for criminal sexual conduct with a minor where the trial court admitted test results showing Petitioner had gonorrhea and another man the minor accused of sexually assaulting her did not, where no one from the laboratories responsible for the analyses testified, since pursuant to *State v. James*, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971), test results offered to “connect a defendant directly with the commission of a crime” “must be substantiated by the person who conducted the tests.”

The trial court erred when it admitted the STD test results of Petitioner and of Stroman, since the analysts—the persons who tested the samples and determined the test results—did not testify in court and the solicitor used the test results to directly connect Petitioner to the crime. To be clear, Petitioner did not object to the admission of the test results on the basis of chain of custody—he does not argue that every person who put their hands on the specimen needed appear in court. Instead, Petitioner objected to the admission of the test results pursuant to *State v. James*, 255 S.C. 365, 179 S.E.2d 41, because without the persons who performed the tests present in court to say what their testing methods and qualifications were, the test results were inadmissible.

In *State v. James*, 255 S.C. at 370, 179 S.E.2d at 43, this Court held that “[w]here the results of tests or analyses are offered to . . . connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses.”¹ The defendant in *James* was tried for attempting to poison her husband by putting arsenic in his

¹ The United States Supreme Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 361 (2009), observed *James* illustrates that South Carolina is among states that “interpret state hearsay rules to require confrontation of the results of routine scientific tests or observations of medical personnel.”

Christmas dinner coffee and attempting to poison him again while he was in the hospital. *James*, 255 S.C. at 367, 179 S.E.2d at 42. A sample of the husband's urine was taken at the Greenville hospital and sent to a lab in California for chemical analysis. *Id.* Over a hearsay objection, two Greenville doctors testified the California lab report showed arsenic in the husband's urine. *Id.*, 255 S.C. at 368, 179 S.E.2d at 42. The California analyst was not called as a witness and the doctors admitted that they did not know the method used for determining arsenic content; the analysis was not done under their supervision; and they could not vouch for the validity of the report. *Id.*, 255 S.C. at 368-69, 179 S.E.2d at 42-43.

In holding the analyst was required to admit the test results, this Court explained, "Where tests or analyses are conducted the cogent elements are the results, methods used and qualifications of the tester. The method used and qualifications of the tester give the results their veracity." *Id.* at 370, 179 S.E.2d at 43. That was so because the doctors "knew nothing about such analysis other than what they read in the report . . . they knew nothing save through hearsay." *Id.* This Court explained that hearsay testimony is not subject to the tests that can usually be applied to ascertain truth, such as the requirement of an oath and the opportunity for cross-examination. *Id.*, 255 S.C. at 369, 179 S.E.2d at 43 (quoting *Cooper Corporation v. Jeffcoat*, 217 S.C. 489, 61 S.E.2d 53 (1950)). This Court noted the effect of this admission deprived the defendant of the right to confront and cross-examine her accusers. *Id.*

However, the Court of Appeals concluded that *James* was distinguishable from Petitioner's case since, unlike *James*, the testing was conducted at an "in-house" laboratory and

there was no Confrontation Clause problem since the test results in this case were non-testimonial under *Davis v. Washington*, 547 U.S. 813 (2006).²

This case is distinguishable from *James*. First, in *James*, the hospital sent the sample off to an independent lab in California and the physicians who testified were not familiar with the lab and could not verify the results. *Id.* at 367-68, 179 S.E.2d at 42. Here, however, the lab that conducted the testing was an in-house lab, and both healthcare providers testified they reviewed and verified the test results of English and Stroman, respectively. Second, unlike the case in *James*, the evidence at issue in this case did not present a Confrontation Clause problem. *See id.* at 370, 179 S.E.2d at 43 (“Whe[n] the results of tests or analyses are offered to prove an essential element of a crime or connect a defendant directly with the commission of a crime, such results must be substantiated by the person who conducted the tests or analyses. Otherwise, the effect of their admission would be to allow a witness to testify without being subject to cross-examination, and thus deprive the accused of his constitutional right to be confronted with and to cross-examine the witness against him. The hearsay rule signifies a rule rejecting assertions offered testimonially which have not been in some way subjected to the test of cross-examination.” (emphasis added) (citations omitted)). Subsequent case law has clarified statements “are testimonial when the circumstances objectively indicate ... that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 814, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). These STD tests were not conducted to establish or prove past events potentially relevant to later criminal prosecution. Instead, English and Stroman voluntarily requested these tests without any law enforcement involvement. Pursuant to *Davis*, the test results were nontestimonial and therefore the admission of these test results did not present a Confrontation Clause issue. For the foregoing reasons, we find the ruling in *James* did not prohibit the admission of English’s and Stroman’s test results.

² *Davis v. Washington*, 547 U.S. at 822, held that statements are testimonial when “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *See also Crawford v. Washington*, 541 U.S. 36, 68 (2004) (nontestimonial hearsay may be exempted from Confrontation Clause scrutiny but “[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination”).

State v. English, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 87).

James was directly on point and the test results should have been excluded. The test results directly connected Petitioner to the crime. The minor had gonorrhea, and both Petitioner and Jamie Stroman had been accused of separately sexually abusing the child. Stroman pled guilty prior to Petitioner's trial and admitted he digitally penetrated the minor. R. 38, l. 24 – 39, l. 15; R. 231. The prosecution used Petitioner's positive test result and Stroman's negative test result to corroborate the minor's testimony that Petitioner had sexual intercourse with her. R. 171, ll. 11-13; R. 179, ll. 4-8. However, no analyst was present to substantiate the test results from Petitioner and Stroman. Instead, like in *James*, the results of Petitioner's test and Stroman's test were admitted through testimony of medical providers who viewed the results after the tests had been completed. R. 140, l. 19 – 146, l. 6; R. 241 – 244; R. 130, l. 9 – 136, l. 24. Here, as in *James*, the medical professionals who testified about the test results of Petitioner and of Stroman knew nothing save through hearsay. They simply read the results. They did not know the methods or qualifications of the testers and the analyses were not done under their supervision.

Davis should not distinguish Petitioner's case from *James*. The test results in *James*, 255 S.C. at 367-68, 179 S.E.2d at 42, would also have been considered non-testimonial under *Davis* since the medical testing in *James* was ordered by doctors for purposes of diagnosing and treating the victim, not for purposes of criminal prosecution. Here, as in *James*, the tests were ordered by medical practitioners, not law enforcement. Moreover, although cross-examination was a significant concern for this Court in deciding *James*, this Court identified other concerns underpinning its decision beyond cross-examination, including the requirement that a declarant be under oath and responsible to answer for perjury. *James*, 255 S.C. at 369, 179 S.E.2d at 43.

Another concern identified by this Court was the jury's role in determining credibility by observing the demeanor of the declarant. *Id.* These reasons exist apart from confrontation—they would also apply in a civil case, for example.

The fact that the laboratory was “in-house” does not solve the problem identified in *James*—the trustworthiness of the results. Trustworthiness is also at the heart of Rule 803(6), SCRE. Rule 803(6), SCRE, provides an exception to the general prohibition on hearsay for records of regularly conducted activity. In *Ex parte DHEC*, 350 S.C. 243, 249–50, 565 S.E.2d 293, 297 (2002), this Court explained that to be admissible under Rule 803(6), SCRE,

memorandum, reports, records, etc. in any form, of acts, events, conditions, or diagnoses, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and **(5) found to be trustworthy by the court.**

(emphasis added). Here, neither Ms. Levi, who testified to Stroman's test results, nor Dr. Frierson, who testified to Petitioner's test results, knew the methods and qualifications of the testers. Without that critical information the records could not be found trustworthy by the trial court. (The trial court here did not make a finding of trustworthiness on the record, although it found the results to be business records.) R. 135, l. 23 – 136, l. 7; R. 44, ll. 11-21. The Court of Appeals therefore erred in finding the records were admissible as business records pursuant to Rule 803(6).

The Court of Appeals also erred in relying on *Ex parte DHEC*. The caselaw applying Rule 803(6), SCRE to medical records is sparse and the holdings have been narrow. The holding of *Ex parte DHEC* was limited to the disease HIV, the agency DHEC, and the offense of exposing others to HIV. Also, the issue addressed by this Court in *Ex parte DHEC* was chain of

custody—not whether the methods and qualifications of the analysts must be established pursuant to *James*. In *Ex parte DHEC*, 350 S.C. at 246, 565 S.E.2d at 295, Doe was indicted for knowingly transmitting HIV to another and for CSC with a minor. This Court held that “HIV tests taken for purposes of medical diagnosis before any charges are pending are trustworthy and should be admitted as business records without a chain of custody.” *Id.* at 251, 565 S.E.2d at 297. This Court found the trustworthiness of medical records to be presumed since the test was relied on for diagnosis and treatment. *Id.* at 250, 565 S.E.2d at 297.

Critically, however, this Court reasoned that because HIV is a permanent condition, Doe could be retested at any time to refute the DHEC test results. *Id.* “If Doe tested negative at the time of trial, the DHEC test results could be ruled out as a false positive as HIV is a permanent condition.” *Id.* In contrast, this Court noted that a “person charged with DUI based on a blood alcohol test taken at the time of his arrest has no such protection and, therefore, needs the indicia of reliability provided by a chain of custody.” *Id.* This Court held narrowly “that HIV test results and other relevant medical information in DHEC’s custody are admissible as business records without a chain of custody under Rule 803(6), SCRE, for purposes of S.C. Code Ann. 44-29-145.” *Id.* at 252, 565 S.E.2d at 298.

The trial court cited *State v. Chisholm*, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011), as an authority for the admission of the test results. However, *Chisholm*, like *Ex parte DHEC*, addressed the chain of custody needed for DHEC’s HIV records. The Court of Appeals recognized in its opinion in this case that the trial court should not have relied on *Chisholm* since *Chisholm* was “inapplicable” to Petitioner’s case. *State v. English*, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 90 n. 6). However, in *Chisholm*, the Court again noted a rationale of *Ex parte DHEC* was that a distinctive characteristic of HIV—its

permanency—allowed an accused to be retested at any time to refute the evidence. *Id.*, 395 S.C. at 270-71, 717 S.E.2d at 619-20.

In *Ex parte DHEC* and *Chisholm*, the appellate courts of South Carolina have explicitly taken the distinctive characteristic of HIV—that it is an incurable disease—into account in their reasoning.³ However, gonorrhea does not have HIV’s distinctive characteristic of permanency because it can be cured by an antibiotic. See *Gonorrhea*, *The Gale Encyclopedia of Medicine* (Jacqueline L. Longe, ed., 4th ed. 2012). An accused cannot simply be retested for gonorrhea to refute an erroneous test result, since a negative test for gonorrhea may only mean the accused was successfully treated for the disease.

The Court of Appeals found that Rule 803(6) and *Ex parte DHEC* permitted admission here.

Dr. Frierson testified he relied on such records to treat his patients. Furthermore, no evidence demonstrates a lack of trustworthiness as to the sources of the information or the methods or circumstances of preparation. Stroman and English each voluntarily requested STD testing before law enforcement became involved in Victim’s case. Healthcare professionals with Lexington Medical Center—as opposed to a law enforcement agency—performed the testing and recorded the results. Because law enforcement was not involved in the testing and the sole purpose of the testing was to diagnose and treat the patients, the trustworthiness of the test records is presumed. See *Ex parte DHEC*, 350 S.C. at 250, 565 S.E.2d at 297 (“The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment.”); *Jamison v. Morris*, 385 S.C. 215, 227, 684 S.E.2d 168, 174 (2009) (recognizing that if a medical test had been performed as part of the hospital’s medical treatment of the subject, rather than in response to a request from law enforcement, the results “would be presumed reliable as a business record”).

³ Although HIV treatments have become more effective over time, the disease was still considered incurable as of 2017. See Meiring de Villiers, *Acquired Immunodeficiency Syndrome: A Forensic Perspective*, 37 *J. Legal Med.* 389, 392 (2017).

Based on the foregoing, evidence supports the trial court's ruling that the test results of Stroman and English were admissible under Rule 803(6) . . . the business record exception.

State v. English, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 89) (footnotes omitted).

The Court of Appeals further concluded, "Although we acknowledge *James* has not been expressly overruled, the South Carolina Rules of Evidence, which provide exceptions to the rule against hearsay, were enacted subsequent to *James*. We believe this point distinguishes this case from *James* and supports the trial court's ruling that the evidence is admissible under Rule 803(6)." *State v. English*, Op. No. 5904 (S.C. Ct. App. Filed April 6, 2022) (Howard Adv. Sh. No. 12 at 89 n. 5).

Ex parte DHEC considered whether a chain of custody was required to establish a defendant had the disease of HIV and found that it was not. However, Petitioner does not argue the presence of every chain of custody witness is required to admit the results. Instead, Petitioner asserts that as held in *James*, 255 S.C. at 370, 179 S.E.2d at 43, since the State used the test to "connect a defendant directly with the commission of a crime, [the] results must be substantiated by the person who conducted the tests or analyses." Ms. Levi, who testified to Stroman's test results, and Dr. Frierson, who testified to Petitioner's test results, could only say that a specimen was taken and submitted to a laboratory and they read the results. This was insufficient to substantiate the results. Neither witness could speak to the methods of testing used or the qualifications of the testers. Petitioner's test results were admitted through the doctor who viewed and "verified" them, and Stroman's results were admitted through a nurse practitioner who viewed and "signed off" on them. R. 140, l. 19 – 146, l. 6; R. 241 – 244; R. 130, l. 9 – 136, l. 24. There was no testimony on what constituted "verifying" or "signing off" on the results.

There was no testimony about laboratory accreditation or inspection, specimen integrity, type of testing, and the presence or use of any confirmatory testing. Absent such information about the methods and qualifications of the analysts, the results could not be found trustworthy by the trial court pursuant to 803(6), SCRE and they were inadmissible under *James*.

The Court of Appeals also erred in finding the holding of *Ex parte DHEC*, 350 S.C. at 250, 565 S.E.2d at 297, is controlling. Gonorrhea is not a permanent condition since it may be easily cured with antibiotics. The gonorrhea tests were a snapshot in time that could not be refuted with later tests; they could only be challenged through cross-examination. Therefore, the trustworthiness of these records should not be presumed as it is presumed with HIV records. Additionally, *Ex parte DHEC* is distinguishable because its holding was aimed at the issue of chain of custody. Similarly, the Court of Appeals erred by relying on *Jamison v. Morris*, 385 S.C. at 227, 684 S.E.2d at 174. *Jamison* is not controlling as the Court there addressed chain of custody. As seen, Petitioner did not challenge the evidence's admissibility based on chain of custody.

Finally, the Court of Appeals erred in determining that the adoption of the evidence rules should distinguish *James*. *James* should be read consistently with Rule 803(6), SCRE, to require testimony by an analyst when medical test results directly connect a defendant to the crime. *See State v. White*, 382 S.C. 265, 272, 676 S.E.2d 684, 687 (2009) (analyzing admissibility of expert testimony by dog tracker under Rule 702, SCRE and principles from case law that existed prior to adoption of rules); *State v. Page*, 406 S.C. 272, 291 n. 7, 750 S.E.2d 623, 633 (Ct. App. 2013) (discussing admissibility of evidence under Rule 401, SCRE and applicable case law).

The admission of the test results was not harmless. "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C.

201, 212, 631 S.E.2d 262, 267 (2006). Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial. *State v. Mitchell*, 286 S.C. 572, 573. 336 S.E.2d 150, 151 (1985). An insubstantial error not affecting the result of the trial is harmless when “guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.” *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). The errors here were not insubstantial and Petitioner’s guilt was not conclusively proven. Absent the test results, the case rested on the minor’s credibility. No eyewitness testimony or other physical evidence corroborated the minor’s allegation that it was Petitioner who assaulted her.⁴

The State also relied on the inadmissible evidence in its closing argument. The solicitor argued, “remember [the minor] tested positive, [Stroman] tested negative. [Petitioner], who [the minor] identified as her perpetrator, tested positive. Positive plus a positive equals a positive and I’m positively sure that you will come back guilty.” R. 179, ll. 4-8. *See Ard v. Catoe*, 372 S.C. 318, 335, 642 S.E.2d 590, 598 (2007) (State’s reliance on defense counsel’s failure to challenge gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice.)

The Court of Appeals erred when it concluded that *James* was inapplicable and the test results were properly admitted under Rule 803(6), SCRE. Pursuant to *James*, when test results are used to directly connect the defendant with the crime, the person who performed the tests must appear in court to substantiate the results. *State v. James*, 255 S.C. at 370, 179 S.E.2d at 43.

⁴ The State presented the testimony of an expert in public health who said that a child was likely to show symptoms of gonorrhea within two to five days from the time of exposure. R. 159, ll. 16-21. The minor said the assault occurred during the last weekend visit she had at Petitioner’s home. R. 65, l. 21 – 66, l. 1. However, the State did not present testimony by any adult that the minor had, in fact, visited Petitioner shortly before her symptoms appeared.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully Submitted,

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
S.C. Bar No. 76081

ATTORNEY FOR PETITIONER

This 3rd day of June, 2022.